Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	
Petition for Declaratory Ruling on the Scope	)	WC Docket No. 02-89
of the Duty to File and Obtain Prior Approval	)	
of Negotiated Contractual Arrangements	)	
under Section 252(a)(1)	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2002 **Released:** October 4, 2002

By the Commission:

I. INTRODUCTION

1. On April 23, 2002, Qwest Communications International Inc. (Qwest) filed a petition for a declaratory ruling on the scope of the mandatory filing requirement set forth in section 252(a)(1) of the Communications Act of 1934, as amended (the Act).[1] Specifically, Qwest seeks guidance about the types of negotiated contractual arrangements between incumbent local exchange carriers (LECs) and competitive LECs that should be subject to the filing requirements of this section.[2] For the reasons explained below, we grant in part and deny in part Qwest's petition.

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[1] 47 U.S.C. § 252(a)(1). *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89 (filed April 23, 2002) (Qwest Petition).

[2] Qwest Petition at 3. The Commission requested and received comments on the Qwest Petition. *See* Pleading Cycle Established for Comments on Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, *Public Notice*, DA 02-976 (rel. April 29, 2002). The following parties submitted comments: AT&T Corp. (AT&T); Office of the Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate; Focal Communications Corporation and Pac-West Telecomm, Inc.; Iowa Utilities Board; Minnesota Department of Commerce; Mpower Communications Corp. (Mpower); New Edge Network, Inc.; PageData; Sprint Corporation (Sprint); Touch America, Inc. (Touch America); and WorldCom, Inc. (WorldCom). The following parties filed reply comments: Association of Communications Enterprises; Association for Local Telecommunications Services (ALTS); PageData; Qwest; Sprint; Verizon; VoiceStream Wireless Corporation; and WorldCom.

II. BACKGROUND

2. Section 252(a)(1) of the Act states:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement . . . shall be submitted to the State commission under subsection (e) of this section.[3]

Qwest argues that this section can most logically be read to mean that the mandatory filing and state commission approval process should apply only to the "rates and associated service descriptions for interconnection, services and network elements."[4] More precisely, Qwest contends that a negotiated agreement should be filed for state commission approval if it includes: (i) a description of the service or network element being offered; (ii) the various options available to the requesting carrier (*e.g.,* loop capacities) and any binding contractual commitments regarding the quality or performance of the service or network element; and (iii) the rate structures and rate levels associated with each such option (*e.g.,* recurring and non-recurring charges, volume or term commitments).[5]

3. According to Qwest, the following categories of incumbent LEC-competitive LEC arrangements should not be subject to section 252(a)(1): (i) agreements defining business relationships and business-to-business administrative procedures (*e.g.*, escalation clauses, dispute resolution provisions, arrangements regarding the mechanics of provisioning and billing, arrangements for contacts between the parties, and non-binding service quality or performance standards);[6] (ii) settlement agreements;[7] and (iii) agreements regarding matters not subject to sections 251 or 252 (*e.g.,* interstate access services, local retail services, intrastate long distance, and network elements that have been removed from the national list of elements subject to

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[3] 47 U.S.C. § 252(a)(1).

[4] Qwest Petition at 10. Qwest contends that its interpretation of section 252(a)(1) is supported by the legislative history of the Telecommunications Act of 1996. *Id.* at 13-14.

[5] Qwest Petition at 29. Qwest also indicates that a description of basic operations support systems functionalities and options to which the parties have agreed should be filed and subjected to state commission approval. *Id.* at 29-30.

[6] Qwest Petition at 31-34.

[7] Qwest Petition at 34-36.

mandatory unbundling).[8]

4. Qwest states that a Commission ruling on this issue will eliminate the prospect of multiple, inconsistent rulings by state commissions and federal courts.[9] Qwest argues that a national policy concerning what must be filed under section 252(a)(1) is necessary to promote local competition, facilitate multi-state negotiations,[10] and prevent overbroad interpretations of this filing requirement.[11] According to Qwest, an overbroad interpretation would reduce the incentives of incumbents and competitive LECs to implement bilateral arrangements that could benefit both parties. For example, Qwest states that the public disclosure of contractual provisions such as settlements of past disputes might discourage the parties from entering into such arrangements.[12] Qwest also contends that an overbroad reading of section 252(a)(1) creates legal uncertainty with respect to the validity of agreements that have not gone through the prior state commission approval process.[13]

5. Most commenters oppose Qwest's petition,[14] arguing that it is unnecessary and that Qwest's proposal interprets too narrowly which agreements must be filed under section 252(a)(1).[15] For example, several commenters argue that service quality and performance standards relate to interconnection and are therefore appropriately included in interconnection agreements.[16] Commenters also contend that competitive LECs need dispute resolution, billing and provisioning provisions in their interconnection agreements.[17] The commenters also disagree with Qwest's view that only certain portions of agreements (related to section 251(b) or (c)) need to be filed for state commission approval and argue instead that the entire agreement

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8 Qwest Petition at 36-37.

9 Qwest Petition at 5.

10 Qwest Petition at 27.

11 Qwest Petition at 22.

12 Qwest Petition at 22.

13 Qwest Petition at 17-18, 23.

14 We note that Verizon filed comments to respond to, in its view, inaccurate statements made by certain commenters. *See* Verizon Reply at 1, 2-3.

15 *See, e.g.,* AT&T Comments at 16-18; Minnesota Department of Commerce Comments at 32-34; WorldCom Comments at 7; ALTS Reply at 4.

16 WorldCom Comments at 7; ALTS Reply at 4.

17 WorldCom Comments at 7; ALTS Reply at 4. Verizon, however, argues that agreements for unregulated services such as billing and collection are not interconnection agreements that must be filed under section 252. Verizon Reply at 2.

must be filed for state commission review and approval.[18]

6. The commenters dispute Qwest's assertions concerning the burden of "overfiling" agreements for state commission approval[19] and disagree with Qwest's interpretation of the legal status of agreements not filed under section 252 or not yet approved by state commissions under the same section.[20] Specifically, these commenters contend that nothing in section 252, or any other provision of the Act, provides that the parties are prohibited from abiding by the agreement's terms until a state commission completes its review of the negotiated agreement.[21] Moreover, according to AT&T, not only does the 90-day approval process not present any legal impediment to parties that would like to begin operating under the terms of a negotiated agreement prior to state commission approval, there is no practical impediment (*e.g.,* compliance jeopardy) because interconnection agreements are rarely rejected.[22]

III. DISCUSSION

7. We grant in part and deny in part Qwest's petition for a declaratory ruling. In issuing this decision, however, we believe that the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements. Indeed, we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements.[23]

8. We begin our analysis with the statutory language. Section 252(a)(1) provides that the binding agreement between the incumbent LEC and the requesting competitive LEC must include a "detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."[24] In addition, section 251(c)(1) requires incumbent LECs to negotiate in good faith, in accordance with section 252, the particular terms and conditions of agreements to implement their duties set forth in sections 251(b) and (c).[25] Based on these

[18] AT&T Comments at 4, 6-9; Mpower Comments at 7; Sprint Comments at 3; WorldCom Comments at 6; ALTS Reply at 2.

[19] *See, e.g.,* AT&T Comments at 13; Sprint Comments at 3.

[20] AT&T Comments at 12; Minnesota Department of Commerce Comments at 38.

[21] AT&T Comments at 12; Minnesota Department of Commerce Comments at 38.

[22] AT&T Comments at 12-13, citing Qwest Petition at 9.

[23] As an example of the substantial implementation role given to the states, throughout the arbitration provisions of section 252, Congress committed to the states the fact-intensive determinations that are necessary to implement contested interconnection agreements. *See, e.g.,* 47 U.S.C. § 252(e)(5) (directing the Commission to preempt a state commission's jurisdiction only if that state commission fails to act to carry out its responsibility under section 252).

[24] 47 U.S.C. § 252(a)(1).

[25] 47 U.S.C. § 251(c)(1).

statutory provisions, we find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).[26] This interpretation, which directly flows from the language of the Act, is consistent with the pro-competitive, deregulatory framework set forth in the Act. This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs. We therefore disagree with Qwest that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply. Considering the many and complicated terms of interconnection typically established between an incumbent and competitive LEC, we do not believe that section 252(a)(1) can be given the cramped reading that Qwest proposes. Indeed, on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions.

9. We are not persuaded by Qwest that dispute resolution and escalation provisions are *per se* outside the scope of section 252(a)(1).[27] Unless this information is generally available to carriers (*e.g.*, made available on an incumbent LEC's wholesale web site), we find that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements. The purpose of such clauses is to quickly and effectively resolve disputes regarding section 251(b) and (c) obligations. The means of doing so must be offered and provided on a nondiscriminatory basis if Congress' requirement that incumbent LECs behave in a nondiscriminatory manner is to have any meaning.[28]

10. Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an "interconnection agreement" and, if so, whether it should be approved or rejected. Should competition-affecting inconsistencies in state decisions arise, those could be brought to our attention through, for example, petitions for declaratory ruling. The statute expressly contemplates that the section 252 filing process will occur with the states,

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[26] We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. *See* Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1). Similarly, we decline Touch America's suggestion to require Qwest to file with us, under section 211, all agreements with competitive LECs entered into as "settlements of disputes" and publish those terms as "generally available" terms for all competitive LECs. Touch America Comments at 10, citing 47 U.S.C. § 211.

[27] Qwest Petition at 31-33.

[28] We note that Qwest has filed for state commission approval agreements containing both dispute resolution provisions and escalation clauses. *See, e.g.,* Qwest Supplemental Reply, WC Docket No. 02-148, at 26-27 (filed Aug. 30, 2002). We incorporate by reference this document into the record in the instant proceeding.

and we are reluctant to interfere with their processes in this area. Therefore, we decline to establish an exhaustive, all-encompassing "interconnection agreement" standard. The guidance we articulate today flows directly from the statute and serves to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval. At the same time, nothing in this declaratory ruling precludes state enforcement action relating to these issues.[29]

11. Consistent with our view that the states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard, we decline to address all the possible hypothetical situations presented in the record before us. We are aware, however, of some disagreement concerning interconnection agreement issues raised recently in another proceeding previously before the Commission.[30] Consequently, we determine that additional, specific guidance on these issues would be helpful.

12. The first matter concerns which settlement agreements, if any, must be filed under section 252(a)(1). We disagree with the blanket statement made by Qwest in its petition that "[s]ettlement agreements that resolve disputes between ILECs and CLECs over billing or other matters are not interconnection agreements under Section 252."[31] Instead, and consistent with the guidance provided above, we find that a settlement agreement that contains an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1). Merely inserting the term "settlement agreement" in a document does not excuse carriers of their filing obligation under section 252(a) or prevent a state commission from approving or rejecting the agreement as an interconnection agreement under section 252(e). However, we also agree with Qwest that those settlement agreements that simply provide for "backward-looking consideration" (*e.g.*, the settlement of a dispute in consideration for a cash payment or the cancellation of an unpaid bill) need not be filed.[32] That is, settlement contracts that do not affect

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[29] This statement also applies to any state enforcement action involving previously unfiled interconnection agreements including those that are no longer in effect.

[30] *Application by Qwest Communications International Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota*, WC 02-148 (filed June 13, 2002). *See also* Letter from Peter A. Rohrbach, Counsel for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (filed Sept. 10, 2002) (withdrawing Qwest's joint applications filed in both dockets); *Application by Qwest Communications International Inc., Consolidated Application for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota*, WC Docket No. 02-148, *Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Montana, Utah, Washington and Wyoming,* WC Docket No. 02-189, Order, DA 02-2230 (rel. Sept. 10, 2002) (terminating both Qwest section 271 dockets).

[31] Qwest Petition at 34.

[32] Qwest Reply at 25-26. *See also* Minnesota Department of Commerce Comments at 6-7 (stating that it did not include in its complaint against Qwest filed with the Minnesota Public Utilities Commission "settlement agreements of what appear to be legitimate billing disputes").

an incumbent LEC's ongoing obligations relating to section 251 need not be filed.

13. Qwest has also argued, in another proceeding, that order and contract forms used by competitive LECs to request service do not need to be filed for state commission approval because such forms only memorialize the order of a specific service, the terms and conditions of which are set forth in a filed interconnection agreement.[33] We agree with Qwest that forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement do not constitute either an amendment to that interconnection agreement or a new interconnection agreement that must be filed under section 252(a)(1).

14. Further, we agree with Qwest that agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and do not otherwise change the terms and conditions of the underlying interconnection agreement are not interconnection agreements or amendments to interconnection agreements that must be filed under section 252(a)(1) for state commission approval.[34] We are unaware of any carrier submitting such agreements for state commission approval under section 252. Directing carriers to do so has the potential to raise difficult jurisdictional issues between the bankruptcy court and regulators and could entangle carriers in inconsistent and, possibly, conflicting requirements imposed by state commissions, bankruptcy courts, and this Commission.

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 251, 252 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 251, 252, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that Qwest's Petition for Declaratory Ruling IS GRANTED IN PART and IS DENIED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[33] Letter from Peter A. Rohrbach, Counsel for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189, at 2-3 (filed Sept. 5, 2002). We incorporate by reference this letter into the record in the instant proceeding. *See also* Minnesota Department of Commerce Comments at 7 (stating that it also did not include in its complaint "day-to-day operational agreements that implement specific provisions of interconnection agreements" such as collocation agreements and applications for access to poles, ducts, conduits, and rights of way).

[34] Qwest Supplemental Reply, WC Docket No. 02-148, at 19-20 n.29 (filed Aug. 30, 2002).